to repay the money is not complete evidence that a conditional sale was intended; but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument." And in *Williams* v. *Owen*, 5 My. & Cr. 303, Lord COTTENHAM said: "If the transaction was a mortgage, there must have been a debt; but how could Owen have compelled payment?" But the later cases seem to have considered the absence of an obligation on the part of the grantor to pay, as of small importance, 3 Lead'g Cas. in Eq. (Am. Notes) 627-8, and cases there cited; and such is the current of decision in Pennsylvania, *Wharf.* v. *Howell*, 5 Binn. 499; *Stœver* v. *Stœver*, 9 S. & R. 434; *Jaques* v. *Weeks*, 7 Watts 268.

Of course, if there is an existing debt the law presumes a promise to pay it upon which an action may be maintained, without any written acknowledgment of it; but it has been held that, in the case of a mortgage, the covenant for the payment of the money must be an express one, and no action will lie on the proviso or condition in the mortgage-deed. "No contract of borrowing or loan," says SERGEANT, J., can be implied in law from the mortgage as the foundation of the action. when the contract between the parties is express and formal. *Expressum facit, cessare tacitum.*" *Scott* v. *Fields*, 7 Watts 361.

4. *Where the grantee enters into immediate possession and enjoyment*, under an absolute conveyance, it will not be easily presumed that the transaction was a mortgage. *England* v. *Codrington*, 1 Eden 169; *Williams* v. *Owen—supra.* But this is by no means conclusive. *Wilson* v. *Shoenberger*, 7 Cas. 299; *Cox* v. *Cox*, 2 Casey 383. And where the grantee receives interest; or, having taken possession, accounts for the rents, retaining the equivalent of interest, the character of his title can hardly be in doubt.

E. C. M.

Supreme Judicial Court of New Hampshire.

RICKER *v.* FREEMAN.

Where B seized A by the arm and swung him violently around two or three times, then letting him go, and A having thus been made dizzy, involuntarily passed rapidly in the direction of and came violently against C, who instantly pushed him away, and A then came in contact with a hook, and sustained an injury; *Held*, that A might maintain trespass *vi et armis* against B.

There was no error in the following instructions to the jury: "That they should inquire who was the first actor or the procuring cause of the injury to A; that B would be liable if the wrongful force which he gave A carried him on to the hook, or if such force, combined with the new force given to him by C, produced the result; but if the jury should find that the injury received by A resulted entirely from the push of C alone, unassisted by the act of B, then B would not be liable; or in other words, if the original force given to A by B had ceased, or time was given to C for reflection and deliberation before he

gave his push, then B would not be liable; that the jury should determine whether the force, originally commenced by B, did at any time cease, and whether it was not directly continued up to the time A struck the hook by the direct agency of B, C lending his aid wittingly or unwittingly to the injury, or whether C, by pushing him from his person, did more than to act in self-defense, and was not justified under the circumstances, in order to save his person and himself from present danger; that the jury should determine, also, whether, from the time A was first seized by B and until the injury was done he could exercise any self-control over his own person, or could in any way have prevented what happened to him."

Where an injury is the result of two occurring causes, one party in fault is not exempted from full liability for the injury, although another party may be equally culpable.

TRESPASS, by William N. Ricker against Edmund J. Freeman. The plaintiff's declaration alleged that "the said Freeman, at etc., with force and arms made an assault upon plaintiff, and beat, bruised, wounded, and ill-treated him, and cast and threw him with great violence against and upon a coat and hat hook, which penetrated the left side of the neck of the plaintiff, severely wounding and lacerating the skin, muscles and blood vessels, causing violent bleeding, great pain, soreness, and swelling, insomuch that the plaintiff's life was despaired of for a long space of time, viz., for the space of two months; and in consequence of said wound, the plaintiff became greatly deformed, weakened and disabled in his spine, neck, face, eyes and other parts of his head, and greatly injured in his hearing, voice, and speech, all which continues hitherto and is likely to be permanent; and also, plaintiff was put to great expense for nursing and medical attendance while laboring under the effects of said wounding, viz., the sum of $200; and other injuries to the plaintiff the defendant then and there did, against the peace," etc.

The evidence in the case tended to show, that on the 18th of October, A. D. 1858, the plaintiff was a pupil in the grammar school, kept in the lower part of the school-house located in the north part of the village of Dover; that he was then some over thirteen years of age; and that the defendant then attended the high school, kept in the second story of the same house, at the same time, being then over sixteen years of age. That there was a common entry way at the foot of the stairs, which communicated with the upper story, and from which

was the door that opened into the grammar school, and another down into the cellar. There was one common door also, which allowed the scholars of both schools to pass from the outside into the entry. Hooks of iron, for the purpose of hanging up the coats and hats of the scholars, were located around the easterly and northerly sides of this entry. These hooks were fastened into cleats, which were made fast upon the sides of the building. Plaintiff's testimony tended to show, that in the afternoon of the aforesaid day he went alone to school, and as he came into the school-house yard he saw the defendant standing in the entry, looking out from the north side of the entry door, and that he dodged back out of sight and as the plaintiff stepped into the door, the defendant caught him by the right arm or wrist, with both of his hands, and swung him violently round two or three times. "This made me dizzy. He let me go, and I passed off in a north-easterly direction and came violently against the Townsend boy, and Townsend pushed me off. When defendant was whirling me round, sometimes my feet were not on the floor, and sometimes they were. When Townsend pushed me off, I went against the hat hook. It entered under my left ear," etc.

The jury found for plaintiff, whereupon defendant moved to set the verdict aside.

Wheeler for the motion.

Christie for plaintiff, contra.

FOSTER, J.—Various exceptions were taken at the trial with regard to the allowance of certain amendments and the admission of certain evidence, which, not being insisted upon in argument, may be regarded as abandoned. Without adverting to them in detail, we may remark that none of them are in our opinion tenable; and subsequent reflection and examination of the exceptions by the defendant's counsel have probably led him to the same conclusion.

The first objection that is now insisted upon relates to the form of the action. In all cases where the injury is done with force and immediately by the act of the defendant, trespass may be

maintained; and where the injury is attributable to negligence, although it were the immediate effect of the defendant's act, the party injured has an election either to treat the negligence of the defendant as the cause of action, and declare in case, or to consider the act itself as the cause of the injury, and to declare in trespass: *Dalton* v. *Favour*, 3 N. H. 466; *Blin* v *Campbell*, 14 Johns. 432.

Mr. Greenleaf, 2 Evid. § 224, says: "The distinction between the actions of trespass *vi et armis* and trespass on the case is clear, though somewhat refined and subtle. By the former, redress is sought for an injury accompanied with actual force; by the latter, it is sought for a wrong without force. The criterion of trespass *vi et armis* is force directly applied, or *vis proxima*. If the proximate cause of the injury is but a continuation of the original force, or *vis impressa*, the *effect* is immediate, and the appropriate remedy is trespass *vi et armis*. But if the original force, or *vis impressa*, had ceased to act before the injury commenced, the effect is mediate, and the appropriate remedy is trespass on the case." And see 1 Hilliard on Torts 97, 105.

Wherever an act is unlawful at first, trespass will lie for the consequences of it. *Reynolds* v. *Clarke*, Strange 634.

Malus animus is not necessary to constitute a trespass. "The defendant was uncocking a gun, and the plaintiff standing to see it: it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass." *Underwood* v. *Hewson*, Strange 596.

In *Weaver* v. *Ward*, Hobart 134, it is said, "no man shall be excused of a trespass except it may be judged utterly without his fault." And in *Scott* v. *Shepherd*, 2 W. Black. 892, it is said, "the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate;" and trespass was held to lie in that case. And see *Jordan* v. *Wyatt*, 4 Grat. 151.

But whether the lawfulness or unlawfulness of the act be

the criterion, it is not necessary to determine in this case. Probably it would not be so regarded; though the opinions of learned judges are somewhat at variance upon this point (see *Scott* v. *Shepherd*, 1 Smith's L. C. 212; *Reynolds* v. *Clarke*, Strange 635; 1 Hilliard on Torts 107), because, in the present case, although no malice is attributed to the defendant, still there can be no denial that his interference with the plaintiff, with force and arms, *was* an *unlawful* assault, and, although the ultimate effect and injury may not be regarded as the *inevitable* result of the original unlawful act, still, if the result was a *consequence* of that act, the plaintiff is entitled to maintain trespass. 1 Chitty Pl. 125-130; *Cole* v. *Fisher*, 11 Mass. 137; *Smith* v. *Rutherford*, 2 Serg. & Rawle 358; *M'Allister* v. *Hammond*, 6 Cow. 342; *Codman* v. *Evans*, 7 Allen 433; *Murphy* v. *N. Y. & N. H. R. R.*, 30 Conn. 187.

But if the appropriateness of the remedy chosen by the plaintiff were not, as we think it is, free from doubt, we should nevertheless be inclined to sustain the action if substantial justice should seem to require it, on the principle stated in *Slater* v. *Baker*, 2 Wils. 359, where it is said: "The court will not, *after verdict*, look with eagle eyes to see whether the evidence applies exactly or not to the case; but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible."

We would not encourage looseness in pleading, and would always endeavor to avoid the confusion which must inevitably result from throwing down the boundaries of actions; but the refined though perhaps clear distinction between the actions of trespass and case should not be strenuously regarded, if injustice would result thereby. "The distinction," says Mr. Perkins, in his notes to Chitty 126, "between trespass and case is in effect broken down in Massachusetts," and it is abolished in Maine by statute. Rev. Stat., ch. 82, § 13.

The more important inquiry relates to the charge and instructions of the court to the jury.

They were directed to inquire who was the first actor or the procuring cause of the injury to the plaintiff. They were told that the defendant would be liable if the wrongful force

which he gave the plaintiff carried him on to the hook, or if such force, combined with the new force given to him by Townsend, produced the result. But if they should find that the injury received by the plaintiff resulted entirely from the push of Townsend alone, unassisted by the act of the defendant, then he would not be liable; or, in other words, if the original force given to the plaintiff by the defendant had ceased, or time was given to Townsend for reflection or deliberation before he gave his push, then the defendant would not be liable. The jury would determine whether the force originally commenced by the defendant did at any time cease, and whether it was not directly continued up to the time the plaintiff struck the hook, by the direct agency of the defendant, Townsend lending his aid wittingly or unwittingly to the injury; or whether Townsend, by pushing him from his person, did more than to act in self-defense, and was not justified under the circumstances in order to save his person and himself from present danger. The jury would determine also whether, from the time the plaintiff was first seized by the defendant and until the injury was done, he could exercise any self-control over his own person, or could in any way have prevented what happened to him.

The substance of these instructions, so far as the defendant's exceptions render them material to this inquiry, is, that if the force or impetus given to the plaintiff by the defendant, when he seized, whirled and slung him away, continued in operation, either alone or in combination with the force or impetus, if any, communicated by Townsend, until this force or impetus impaled the plaintiff upon the hook, and so the defendant, either solely or in conjunction with Townsend, inflicted the injury, such injury was the direct and proximate result of the defendant's original wrongful act, and he must be answerable for the consequences.

It is quite clear that but for the defendant's wrongful act, the plaintiff would have sustained no injury. It is equally clear that, under the instructions of the court, the jury must have found, in order to charge the defendant, that the original force or impetus given to the plaintiff had *not* ceased, and

that time was not given Townsend for reflection or deliberation before he pushed the plaintiff off, and that Townsend, either in self-defense or in obedience to an uncontrollable impulse and instinct, became the involuntary means of continuing the original force and impetus which cast the plaintiff upon the hook. They must also have found that, after the first assault by the defendant, the plaintiff was incapable of exercising self-control or preventing the result.

We have seen that malice is not essential to the maintenance of trespass for an assault, but that the action is supported by a negligent act and pure accident, if the negligent or accidental act is also a wrongful act. And we think the principle is clearly established, that negligence may be regarded as the proximate cause of an injury, of which it may not be the sole nor the immediate cause. If the defendant's negligent, inconsiderate and wanton, though not malicious act, concurred with any other thing, person or event, other than the plaintiff's own fault, to produce the injury, so that it clearly appears that, but for such negligent, wrongful act, the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent, wrongful act may not have been the *nearest* cause in the chain of events or the order of time. Shearman & Redfield on Negligence, § 10, and cases cited in note.

In trespass for an assault, it cannot be essential that the defendant should *personally* touch the plaintiff; if he does it by some intermediate agency, it is sufficient. The intermediate concurring act will not purge the original tort, nor take assignment of the responsibility.

In *Jordan* v. *Wyatt*, 4 Grattan 151, BALDWIN, J., says: "The terms 'immediate' and 'consequential' should, as I conceive, be understood, not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act, but in reference to the progress and termination of the act—to its being done on the

one hand, and its having been done on the other. If the injury is inflicted by the act at any moment of its progress from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence."

The defendant objects particularly to that part of the charge in which the jury were told that "if the original force given by Freeman had ceased, or time was given Townsend for reflection or deliberation before he gave the push, then Freeman would not be liable." And he contends that, under these instructions, the jury must have found either that Townsend's force combined with the original impetus given by the defendant, or that Townsend did not have time for reflection and deliberation before he gave the push; that the jury might have decided the case upon the latter consideration, which, he says, would be wrong, because Townsend was bound to reflect and deliberate. The force projected by the defendant having ceased, as he contends, the new force given by Townsend was original, because not demanded for the self-defense of Townsend; that the plaintiff, not being a dangerous missile or instrument, like the famous *squib* in *Scott* v. *Shepherd*, Townsend had no right to push him off; and if he did so, to the plaintiff's injury, the result cannot be considered the proximate or immediate act of the defendant, and so he is not answerable.

If it be suggested that human nature *instinctively* repels the forcible contact of a person or thing thrown or falling against a person, the defendant replies that the person thus assailed must control that impulse, and must take time for reflection and deliberation before he can act; or, at any rate, if he does not, the projector of the original force is exonerated, because the original force has ceased and stopped. We think this proposition is altogether too refined.

A man instinctively repels violent contact with a foreign and external substance. He can no more control the impulse to ward off and repel a sudden and unlooked-for blow, than

an unreasoning, inanimate, but elastic substance can control, by superior power of gravity, the natural repulsion and rebound of the thing thrown or falling violently upon or against it; and it can hardly be said that the original force has ceased or stopped at all, during the inconceivably sharp point of time interposed between the contact and the repulsion of a blow striking an inanimate elastic object, or an object animate, sentient, but also involuntarily repellant.

The substance of the charge in this particular was, that if Townsend instinctively pushed off the plaintiff, Townsend's push was the defendant's act. This was correct. The act of Townsend was the direct and inevitable consequence of the defendant's act. The defendant set in motion the train of causes which led directly to the unfortunate result. In the language of DEGREY, C. J., in *Scott* v. *Shepherd*, "I look upon all that was done subsequent to the original throwing, as a continuation of the first force and first act. The new direction and new force flow out of the first force, and are not a new trespass."

The act of Townsend is involuntary. Committing no voluntary wrong, he is but a link in the chain of causes of injury of which the defendant is the wrongful author. A man pushes another against a board, which, springing, repels the contact with the man, and throws the latter against a rock or upon the ground. It is the act and fault of the original assailant and not of the board. The man and not the board is liable. The result in law is the same whether the intermediate concurring object is a board or a boy, if the boy has no more volition than the board.

The defendant is to be regarded as "one who negligently sets mechanical forces in operation beyond his power to stop or safely direct, or as one who carelessly puts destructive implements or materials in situations where they are likely to produce mischief." *Underhill* v. *Manchester*, 45 N. H. 218.

The natural, innocent impulse of Townsend in this case is a natural force in Townsend, set in motion by the defendant, and in no essential particular differs from the natural forces of the material world. *Guille* v. *Swan*, 19 Johns. 381.

It was not necessary, therefore, as we regard it, that the jury should have come to the conclusion that Townsend pushed off the plaintiff in self-defense. They *might* have done so, upon the evidence; and upon *such* finding the defendant would clearly be liable. Such a condition of things would bring the case precisely within the doctrine of *Scott* v. *Shepherd*, and within the principle declared by GOULD, J., when he says: "I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed on Willis and Ryal excited self-defense, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. What Willis did was by necessity, and the defendant imposed that necessity upon him."

There is still another aspect of the case, in which, if it were possible to regard Townsend as contributing to the unfortunate injury of the plaintiff by his own *negligence* and *careless* warding off the person of the plaintiff, the result would still be not more favorable for this defendant. Though a third person's negligence may have contributed to the result, so that such third person might even be liable to answer in damages, still the original author of the mischief will not any the more be excused.

In *Chapman* v. *The New Haven R. R. Co.*, 19 N. Y. 341 an action was sustained against the defendant for an injury occasioned to the plaintiff by a collision between a train of cars upon its road and one upon the Harlem railroad, and which would not have occurred but from the negligence of the latter road, in the cars of which the plaintiff was a passenger; thus, in effect, holding that where the injury was the result of two concurring causes, one party in fault is not exempted from full liability for the injury, although another party was equally culpable.

And in *Peck* v. *Neal*, 3 McLean 22, the driver of a coach was considered liable to the plaintiff for an accident happening through his negligence, although the negligence of the driver of the coach in which the plaintiff sat contributed to

the accident, and although, it was said, an action might lie against the latter.

And see *Brehm* v. *The Great Western Railway*, 34 Barb. 274, and *Mott* v. *The Hudson River R. R.*, 8 Bosw. 345. In the latter case, the plaintiff's buildings were on fire; and while the firemen were endeavoring to extinguish it, the cars of the defendant passed over the hose, cutting and rendering it unfit for use, in consequence of which the buildings were consumed. It was held, that if the act were done by the concurring negligence of the defendant and the firemen, in such sense that the hose would not have been cut if either had been free from negligence, the plaintiff was entitled to recover.

Upon all these considerations, we are of the opinion that there was no error in the instructions of the court, and that the plaintiff may maintain trespass for the injury which he has sustained.

Supreme Judicial Court of New Hampshire.

RAY *v.* ADDEN.

A husband is not liable to an attorney for professional services rendered his wife in defending a libel for divorce by the husband against her upon the ground of adultery, even though such defense may prove successful.

ASSUMPSIT, by Ossian Ray against Edward F. Adden, for professional services rendered defendant's wife at her request. Defendant commenced a libel for divorce against his wife, for the alleged cause of adultery, which was entered in court at July term, 1866, for Coos county, and continued from term to term until the March adjourned term, 1870, when, upon hearing, said libel was dismissed without prejudice. At the July term, 1867, on application of the libellee, an allowance of thirty dollars was granted her by the court to aid her in defending said libel, which was paid by the defendant. Plaintiff claims and offers to prove that from the time of filing said libel, said defendant's wife has been and is destitute of property and unable to pay her counsel, who has received nothing toward his services and advances, except said thirty dollars.